(7)

No. 05-1323

IN THE

# Supreme Court of the United States

UGI UTILITIES, INC.,

*Petitioner,*

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## SUPPLEMENTAL BRIEF OF RESPONDENT


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## RULE 29.6 STATEMENT

The Rule 29.6 statement in the brief in opposition is current.

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## SUPPLEMENTAL BRIEF OF RESPONDENT

Responding to an invitation from this Court, the Government has filed a brief recommending that this Court hold the petition filed by UGI Utilities Inc. in this case pending disposition of the petitions in *E.I. du Pont de Nemours & Co. v. United States*, No. 06-726 (cert. filed Nov. 21, 2006) (*DuPont*) and *United States v. Atlantic Research Corp.*, No. 06-562 (cert. filed Oct. 24, 2006), both of which the Government urges this Court to grant. Br. of the United States As *Amicus Curiae* ("U.S. Br.") 2. Notwithstanding its original filing of an opposition to the petition, respondent Consolidated Edison Company of New York, Inc. ("Con Ed") respectfully disagrees with the Government's recommendation. If the Court is inclined to grant certiorari on the question of the availability of private rights of action under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), it would be better served to grant the *DuPont* and *UGI* petitions rather than granting two petitions that both involve actions against the United States. By doing so, the Court may then decide the question of the availability of section 107(a) actions both against the United States and against private parties.

In this case, the Second Circuit addressed an issue left open in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), and held that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding but that, if sued, would be held liable under section 107(a) to recover necessary response costs incurred voluntarily." Pet. App. 16a-17a. UGI filed a petition for certiorari seeking review of this decision. Con Ed opposed the petition on the grounds that, at the time, "only one court of appeals – the Second Circuit – has had an opportunity to consider the many questions left open in *Aviall*, and even that court addressed but one of them." Opp. 5. Con Ed recommended instead that this Court forbear granting certiorari to allow the many questions identified in *Aviall* "to be given

'full consideration' (*Aviall*, 543 U.S. at 169) by the various courts of appeals which now or soon will have the issues before them." Opp. 5.

Circumstances have changed since Con Ed filed its opposition on June 2, 2006. Two other courts of appeals have now decided the question of the availability of a section 107(a) action to potentially responsible parties (PRPs) who cannot seek contribution under section 113(f), and have created a direct and acknowledged 2-1 circuit conflict. Relying on the Second Circuit's decision below, the Eighth Circuit stated that "[w]e agree with our sister Circuit, and hold that it no longer makes sense to view § 113 as a liable party's exclusive remedy." *Atlantic Research Corp. v. United States*, 459 F.3d 827, 834 (8th Cir. 2006). Accordingly, the Eighth Circuit followed the Second Circuit's lead and held that an action under section 107(a) is available to "parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Id.* at 835.

The Third Circuit by contrast expressly rejected the Second Circuit's analysis, and refused "to imply a cause of action for contribution under § 107 or the common law available to PRPs engaged in *sua sponte* voluntary cleanups." *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 543 (3d Cir. 2006). It further "note[d] that *Atlantic Research* relies almost entirely on the reasoning of *Consolidated Edison*, and thus our consideration of the Second Circuit's case applies as well to the decision of the Eighth Circuit." *Id.* at 529 n.18. In light of the circuit conflict that emerged, the United States and DuPont have petitioned for writs of certiorari to the Eighth and Third Circuits respectively.

This Court may still wish to defer review until a case arises addressing all the issues flagged in *Aviall*. *See* Opp. 3. But if this Court decides to resolve the circuit conflict now, the better course is not to grant the *DuPont* and *Atlantic Research* petitions, as the Government proposes. While the Government may prefer to be a petitioner in *Atlantic Research* with

the right to file both an initial and reply brief, there would be little point from this Court's perspective in granting consolidated review of two cases involving section 107(a) actions against the United States that pose essentially identical issues.

This Court would be better served to grant the *DuPont* and *UGI* petitions, and take the opportunity to resolve the question of the availability of private rights of action under section 107(a) in the most important contexts where it arises: a suit against the United States as a PRP (presented in *DuPont*), and against nonfederal private PRPs (presented in *UGI*).

Consideration of both the *DuPont* and *UGI* petitions would benefit this Court's review. First, although CERCLA contains a broad waiver of sovereign immunity providing that federal departments, agencies, and instrumentalities "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title," 42 U.S.C. § 9620(a), this Court may wish to consider whether it has the same latitude to find implied rights of action against the Federal Government as it does against nongovernmental actors. *Key Tronic Corp. v. United States*, 511 U.S. 809, 817-18 & n.11 (1994) (stating that section 107(a) specifies that enumerated parties "'shall be liable,'" but the question who may enforce that liability is a matter of judicial implication).

Second, the availability and scope of any implied right of action under section 107(a) cannot be resolved without an understanding of the scope of the express right of action granted to PRPs under section 113, 42 U.S.C. § 9613. The Court addressed the scope of section 113(f)(1) in *Aviall*, but has not yet addressed section 113(f)(3)(B). That section provides that:

> [a] person who has resolved its liability to the United States or a State *for some or all of a response action* or for some or all of the costs of such action in an adminis-

> trative or judicially approved settlement may seek contribution from any person who is not party to a settlement [that provides contribution protection].

*Id.* § 9613(f)(3)(B) (emphasis added). Among the three courts of appeals whose decisions this Court is urged to review, the Second Circuit alone has decided the availability of section 113(f)(3)(B) and section 107(a) remedies to a settling PRP plaintiff. Here, Con Ed executed an administrative settlement agreement with the New York State Department of Environmental Conservation ("NYSDEC") to clean up the sites in question. The Second Circuit construed the agreement to provide (1) as to recovery of the NYSDEC's own response costs, a release only as to claims under state law, and (2) as to enforcement actions, a covenant not to sue under CERCLA only during the implementation of the agreement, and even then with exceptions for actions responding to significant threats from the existing contamination and for summary abatement. Pet. App. 9a-10a. Because there was no categorical covenant or release, and NYSDEC "might still seek to hold Con Ed liable under CERCLA," the Second Circuit ruled that "Con Ed [had not] resolved its liability to the Department under CERCLA" and therefore cannot sue another PRP under section 113(f)(3)(B). *Id.* at 10a.

The Government expresses doubt about the Second Circuit's section 113(f)(3)(B) ruling. U.S. Br. 12. Nonetheless, because Con Ed's entitlement to bring an action under section 113(f)(3)(B) might provide an alternative ground in support of the judgment, or may present an issue the determination of which this Court deems necessary to an intelligent resolution of the question presented regarding section 107(a) remedies, *Ohio v. Robinette*, 519 U.S. 33, 38 (1996), the Government advises this Court to hold rather than grant the *UGI* petition. U.S. Br. 10-11. While the Government is right to question the Second Circuit's section 113(f)(3)(B) ruling, it is mistaken to counsel against granting *UGI* on this basis.

The scope of the express section 113(f)(3)(B) right of action is unquestionably a predicate to an intelligent resolution not just of Con Ed's entitlement to a section 107(a) remedy, but also of any determination of what right of action is available under the latter section. Indeed, to the extent this Court invokes its implied-right-of-action jurisprudence in construing section 107(a), the scope of express remedies is a necessary element of the analysis. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19-20 (1979). Moreover, this Court's deliberation over whether Congress intended a section 107(a) private right of action for PRPs would be aided by knowing whether such a remedy would be strictly limited to independent volunteers (*i.e.*, PRPs who perform clean-up without settlement agreements with federal or state environmental regulators), or also would be the *only* cost-recovery remedy available to the many PRPs who have voluntarily entered into settlements with federal or state authorities that provide something less than a categorical release of future CERCLA liability.[1]

This Court should recognize that the Second Circuit's crabbed construction of section 113(f)(3)(B) – which depends on the scope of covenants not to sue – would apparently foreclose that express remedy even to many PRPs who have entered into *federal* CERCLA settlements. The inclusion of covenants not to sue in federal agreements, and their scope, are "[d]iscretionary" with the President, and depend upon a public-interest analysis. 42 U.S.C. § 9622(f)(1), (4) (setting

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[1] Besides the substantial number of (typically large) remediations conducted under federal auspices, U.S.E.P.A., *Superfund National Accomplishments Summary Fiscal Year 2006* (last updated Dec. 11, 2006), *available at* http://www.epa.gov/superfund/action/process/numbers06.htm, state judicial and administrative settlements may number in the thousands. In New York alone, there have been more than 250 remediation actions conducted under its State Superfund, Brownfields, and Voluntary Clean-Up Programs. NYSDEC, *Annual Remedial Programs Report For State Fiscal Year 2005-06* at 3 tbl.2, 5 tbl.3, 7 tbl.5 (2006), *available at* http://www.dec.state.ny.us/website/der/2006annualreport.pdf.

out public-interest factors for the President to consider in "assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included"); *see also id.* § 9622(c)(1) ("the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties").

Equally problematic for PRPs who settle with the federal government is the Second Circuit's holding that no section 113(f)(3)(B) remedy is available if the agreement reserves the right to sue under CERCLA after implementation of the agreement or to redress significant threats from the existing contamination. Pet. App. 9a-10a. Such reservations exist in federal settlements. Even apart from any conditions and exceptions the President may impose in a covenant not to sue, by statute no covenant takes effect "until the President certifies that remedial action has been completed in accordance" with CERCLA requirements, and such covenants are always "subject to the satisfactory performance by such party of its obligations under the agreement concerned." 42 U.S.C. § 9622(f)(3), (5).

Finally, except in extraordinary circumstances specified by statute, the President may not covenant "concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time" of presidential certification. *Id.* § 9622(f)(6)(A).

In short, neither federal nor state agreements are likely to provide the kind of categorical covenants not to sue under CERCLA that the Second Circuit envisions[2]; the many un-

[2] In New York, "[s]ome of the earlier agreements contained complete releases," but "the trend now is for the releases to have reopeners which limit the scope of the release," excepting such circumstances as unknown site conditions, new information received by NYSDEC, implementation failures, new contamination, new site uses, and contaminant migration. New York State Bar Ass'n, *Redevelopment of Contaminated Properties in*

knowns associated with hazardous wastes and the need to reserve the power of governments to redress future public health and safety risks militate against them.

This Court need not resolve any issues of construction of section 113(f)(3)(B) other than the question of its basic scope, which the Second Circuit decided wrongly. The Second Circuit's construction is inconsistent with the plain statutory language providing a contribution remedy to any "person who has resolved its liability to the United States or a State for some or all of a response action." *Id.* § 9613(f)(3)(B). The natural interpretation of that language is that if a person performs an agreement with a State to "respond" by hazardous-waste "removal" or "remedial action" under CERCLA, *id.* § 9601(23)-(25), for which it would potentially be liable in an enforcement action brought by a State, the person may seek contribution for the costs of response from another responsible party. *Cf. id.* § 9628(a)(2) & (b) (addressing state response programs under state law and relative federal and state enforcement roles). Accordingly, it does not matter whether the State in the agreement has covenanted not to sue the PRP under CERCLA to perform additional clean-up at the site; so long as the clean-up performed by the person under the agreement "resolved its liability to the United States or a State *for some* or all of a response action," *id.* § 9613(f)(3)(B) (emphasis added), that person may seek contribution from other responsible parties under section 113(f)(3)(B).

There is no question, especially construing the facts in favor of Con Ed at the summary judgment stage, that the millions of dollars that Con Ed has expended and is expending removing and remediating hazardous waste under the NYSDEC agreement resolved some of the liability it would have had if the State had brought an enforcement action. As the Second Circuit acknowledged, under CERCLA "Con Ed has incurred and is incurring 'costs of response,' in that it is in-

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*New York – The Impediments and the Solutions: A Guide to the Practitioner* 39 (1996).

curring costs of 'removal' and 'remedial action.'" Pet. App. 15a. Thus, even if this Court were to accept the Second Circuit's unduly narrow reading of the NYSDEC settlement agreement,[3] it should reject the Second Circuit's untenable construction of section 113(f)(3)(B) and rule in favor of respondent.

Not only is the scope of section 113(f)(3)(B) critical to any determination of available rights of action under section 107(a), but also there is no prudential reason to avoid this threshold issue. The typical concern with alternative grounds or threshold legal issues is that they might preclude consideration of the question presented that this Court deemed pressing enough to warrant certiorari. While that concern may be present if only a single case is under consideration, it is not relevant here because Con Ed proposes that this petition be granted in tandem with the *DuPont* petition. No party disputes that *DuPont* should be granted, and the *DuPont* petition cleanly presents the question whether section 107(a) provides a right of action for a PRP who has no remedy under section 113. Thus, giving plenary consideration to the section 113(f)(3)(B) issue in *UGI* can in no circumstance deprive the Court of the opportunity to resolve the section 107(a) issue; it can only enhance the Court's consideration of that question, for the reasons already given. There is no sense in waiting for a circuit conflict to emerge on section 113(f)(3)(B) when its

[3] For example, besides NYSDEC's promise not to bring a CERCLA action except as provided, Pet. App. 10a, the agreement specifically recites that "to the extent authorized under 42 U.S.C. Section 9613 and any other applicable law, [Con Ed] shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the alleged contamination which is addressed under this agreement." C.A. App. 888. NYSDEC could only make that representation if in performing the agreement Con Ed "resolved its liability to ... a State in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(2). Thus, UGI is wrong in stating that the clean-up agreement makes no mention of resolution of liability for CERCLA response actions (UGI Br. In Response To Brief For The United States As Amicus Curiae 5 n.3).

interpretation is a predicate to comprehensive, intelligent resolution of the section 107(a) issue, and when uncertainty as to whether settling PRPs have *any* contribution remedy under section 113(f)(3)(B) absent a categorical covenant not to sue from the federal or state agency may deter CERCLA settlements in the future.

The Government's second objection to granting the *UGI* petition appears to be based on a misreading of the Second Circuit's decision. The Government states that:

> [t]his case may also constitute a less suitable vehicle than *Atlantic Research* or *DuPont* on the ground that, unlike those cases, it does not present the subsidiary question of whether one PRP could bring an action against another on the theory that Section 107(a) contains an implied right to contribution.

U.S. Br. at 13. The Government concludes that the Second Circuit held that "Section 107(a) *expressly* authorized one PRP to sue another," relying on the court's statement that Con Ed's right to "'sue under section 107(a) is easily resolved based on that section's plain language.'" *Id.* (quoting Pet. App. 14a). But the Second Circuit did not (and could not) quarrel with this Court's holding that, in contrast to the express remedy in section 113, CERCLA "impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Key Tronic*, 511 U.S., at 816; *id.* at 818 ("although § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs, that cause of action is not explicitly set out in the text of the statute," which "only impliedly authorizes suit"); *see also Aviall*, 543 U.S. at 174 (Ginsburg, J., dissenting) (noting that the *Key Tronic* Court recognized a "§ 107 implied right").[4] Rather, the Second Circuit held that because Con Ed is a "'person'" incurring "'response costs,'"

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[4] This Court has left open the question whether the implied right of action in section 107 is one for cost-recovery or contribution or both. *Aviall*, 543 U.S. at 170-71.

it is a party to whom the responsible persons named in section 107 are liable as a matter of plain statutory text, and thus a right of action must be recognized in its favor. The Second Circuit simply would not read into the statutory language on liability a limitation to persons "innocent of wrongdoing." Pet. App. 14a-15a. The Government's second objection is thus based on a mistaken premise. In any event, the objection is immaterial if the Court were to grant both *DuPont* and *UGI*. The Government concedes that *DuPont* presents the question of an implied right of action under section 107(a), U.S. Br. 13, so granting *UGI* as well would not affect the Court's consideration of that aspect of the issue.

In summary, even if this Court were not inclined to address the section 113(f)(3)(B) issue, it still should grant certiorari in both *DuPont* and *UGI* so that it may resolve the section 107(a) issue in the context of both actions against a federal PRP and actions against a nonfederal private PRP. But, as a matter of prudent discretion, the Court should reach the section 113(f)(3)(B) issue based on full briefing by parties with a direct stake in the outcome of that issue because it is a predicate to the intelligent resolution of the important section 107(a) issues presented by the various petitions.

## CONCLUSION

If the Court resolves to decide the section 107(a) question, it should grant both the *DuPont* and *UGI* petitions and set them for argument.

Respectfully submitted,

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